Filed 2/17/09 In re K.K. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re K.K. et al., Persons Coming Under the Juvenile Court Law.	B205791
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Appellant, v. S.K., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK71325)

Appeal from the orders of the Superior Court of Los Angeles County. Jan Levine, Juvenile Referee. Affirmed.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Judith A. Luby, Deputy County Counsel, for Plaintiff and Appellant.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and Appellant.

Father S.K. appeals from the dependency court's jurisdictional findings and dispositional order. The Department of Children and Family Services cross-appeals from the dependency court's order dismissing an allegation in the department's petition against father under Welfare and Institutions Code section 300 (section 300). We affirm the court's findings and order.

FACTS AND PROCEEDINGS

Minor K. was born in December 2005. K.'s brother, minor D., was born in January 2008. The Department of Children and Family Services (the department) became involved in the children's lives when their mother was recuperating in the hospital after giving birth to D. When visiting mother in the hospital, father "forcibly grabbed" minor K. and started to carry K. from mother's room while K., mother later testified, was "screaming and wailing." Mother asked father not to take K. from her and told him she wanted K. to spend the night at her parents' home. Father rejected her pleas and left the hospital with K. Mother called father on his cell phone and asked him to return to the hospital. "Screaming" at her over the phone that he could do as he pleased with their children, father refused to return with K. Hospital personnel reported the incident to police, who the next day investigated the fracas between mother and father. The investigating officer concluded K. was unhurt and father had not committed a crime.

The department also investigated the incident. Following its investigation, the department filed a petition under section 300 and placed the children in the custody of mother, who had moved into her parents' home following her estrangement from father. The petition alleged father had engaged in at least one physical altercation with mother during which he forcibly pushed her. It also alleged he flew into fits of physical rage in K.'s presence. The petition asserted the parental fighting and father's outbursts endangered the children's physical and emotional well-being and put them at risk of physical harm. (§ 300, subd. (b).) Under a second count, the petition alleged father had forcibly removed K. from mother's hospital room and inappropriately yelled and screamed at K., leading witnesses to believe K. feared father. Father's emotional abuse

of the children, according to the second count, put them at risk of harm. Finally, the petition alleged under a third count that father's abuse of K. put K.'s sibling, D., at risk of harm. (§ 300, subd. (j).)

The court adjudicated the petition. Father testified and disputed the petition's allegations and conclusions. He claimed he did not forcibly remove K. from mother's hospital room. Moreover, K. did not wail and cry as mother claimed, but merely whined and squirmed, calming down completely by the time they reached the hospital elevator. Father admitted to some acts of physical rage, such as punching his car steering wheel when stuck in traffic, but denied others such as punching a hole in a wall. He also admitted he "raised [his] voice" at mother, but denied pushing her or yelling at her in K.'s presence.

The court found dependency jurisdiction existed. Finding "clear and convincing evidence" of a substantial danger of harm to the children's physical or emotional well-being if they returned to father's custody, the court sustained the petition's allegations that father had failed to protect the children from the risk of harm to their emotional or physical well-being, and that father's abuse of K. endangered D. The court ordered the children's suitable placement with mother and ordered that father have monitored visitation. The court also ordered the department to provide reunification services to father, including anger management and individual counseling, and parenting classes. Father appeals from the court's jurisdictional findings and dispositional order. The department cross-appeals from the court's dismissal of the petition's allegation that father posed a risk of inflicting "serious physical harm" on the children.

DISCUSSION

1. Court's Refusal to Order K.'s Presence During the Adjudication Hearing

The department's petition alleged K. was afraid of father. Hoping to rebut that allegation, father asked the court to order K.'s presence in the courtroom to demonstrate K. did not fear father. The court denied father's request.

The parties agree we review the court's refusal to order K. to the courtroom for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; Evid. Code, § 352.) We find none here. K. was 26 months old during the adjudication hearing. Thrusting a child of such tender years into an emotionally charged, likely contentious, and almost undoubtedly alien courtroom environment, in order to observe the child interact with a parent, is undesirable. But even if the court erred in refusing to order K.'s presence during the adjudication hearing, the court's error was harmless. The court deleted the petition's allegation that K. feared his father; instead, the court sustained a different allegation that witnesses concluded from their observations that it *appeared to them* that K. feared his father, observations the record amply supported. Any calmness father hoped K. might have exhibited with him in the courtroom would have done little to undermine those witnesses observations from other times and places.

2. Barring Paternal Grandparents' Testimony

The paternal grandparents attended the adjudication hearing. Father wished to call them to the stand to testify about the then-current state of K.'s relationship with father. He offered their testimony to rebut the department's evidence that K. feared him. The court did not let the grandparents testify because they did not witness the incident in the hospital, which underlay the petition's assertion that K. feared father.

We review the court's ruling to exclude the grandparents' testimony for abuse of discretion. (*In re Jasmon O., supra*, 8 Cal.4th at p. 415.) We find no abuse of discretion in the court's refusal to hear the grandparents' testimony about events unconnected to the hospital. But even if the court erred in excluding the grandparents' testimony, the error

was not prejudicial because the court rejected the department's allegation that K. feared father, which was the point the grandparents would have addressed. And finally, all the above notwithstanding, the court received into evidence social workers' reports confirming the grandparents' high regard for father's parenting skills and self-control, so that father received the benefits of his parents' favorable views of him without their being subject to cross-examination, which further reduced any possibility of prejudice from their not taking the stand.

Father also contends the court violated his right to due process and to present evidence when the court told the parties it intended to complete the adjudication hearing, which had begun at 2:25 p.m., by 4:15 p.m. that same afternoon. The court told father's counsel that to finish in time the court insisted counsel be "concise" in her closing argument. Father folds his due process argument into the section of his brief discussing the court's exclusion of the paternal grandparents' testimony, instead of discussing it in a separate section of the brief under its own heading, as required by court rules. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) We nevertheless address his argument in order to note that he cites no authority that a court's urging counsel to be "concise" violates a party's right to due process – if anything, concision is arguably good advocacy. Furthermore, the court issued its time directive during closing argument after father had presented his evidence, and therefore did not, as father asserts, interfere with his presentation of his case.

3. Substantial Evidence Under Section 300, Subdivision (b)

The court sustained the petition's allegation that jurisdiction existed under section 300, subdivision (b). That provision applies when a substantial risk exists that a child has suffered, or will suffer, serious physical harm or illness. (*In re David M.* (2005) 134 Cal.App.4th 822, 829.) Father contends the court erred because no evidence existed that he inflicted serious physical injury on his children. Father's most troubling use of force against K. or D. occurred in mother's hospital room when father carried (the department says "manhandled") K. away, but father did not bruise or otherwise injure K.

and the police concluded K. was unhurt. Father's contention is nevertheless unavailing because case law establishes that domestic violence creates a risk of serious physical harm or illness to a child and thus satisfies section 300, subdivision (b). (See *In re Heather A.* (1996) 52 Cal.App.4th 183, 194 ["It is clear to this court that domestic violence in the same household where children are living *is* neglect; it is a failure to protect [children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. Such neglect *causes* the risk"].) Here, evidence existed of domestic violence between father and mother. Mother testified father pushed her as they argued over disciplining K. In another incident, he "dragged" her with enough force to inflict "pain" as they walked to a medical appointment, making it difficult for her to walk. And finally, she complained that he yelled at her for reasons unknown to her. The court credited mother's testimony, finding specifically that father had "engaged in at least one physical altercation with the children's mother . . ., including the father forcibly pushing the mother. . . . Such violent conduct on the part of the father against the mother and in the presence of the child(ren) endangers the children's physical and emotional health and safety and places the children at risk of physical harm, damage, danger, physical abuse and failure to protect. The court therefore did not err in finding jurisdiction under section 300, subdivision (b).

4. Substantial Evidence of Risk to Sibling

The court sustained the petition's allegation that jurisdiction existed under section 300, subdivision (j), which applies when abuse or neglect of one child poses a risk of harm to that child's sibling. (§ 300, subd. (j).) The petition based its allegation of a risk of harm to K.'s sibling, D., based on the events involving K. at the hospital, as well as father's yelling and screaming at K. Father contends the evidence of risk of harm to D. was insufficient because the evidence of risk of harm to K. was insufficient. Because we have concluded that sufficient evidence existed of risk of harm to K., the premise of father's contention that D. was not at risk likewise fails. Accordingly, the court did not err in finding jurisdiction over D. under section 300, subdivision (j).

5. Reunification Plan

The court ordered father to participate in parent education, domestic violence counseling, and individual counseling. The court's order directed that the counseling cover "case issues." Father contends the order lacked sufficient specificity. He asserts the court should have identified specific issues for counseling, instead of suggesting only "case issues." He further asserts the order should have described the progress he needed to show to be deemed in compliance with the reunification plan.

Father failed to preserve for appeal his contentions about the reunification plan because he did not object in the trial court to the reunification plan or the court's order. (*Amanda H. v. Superior Court* (2008) 166 Cal.App.4th 1340, 1347, fn. 5 ["a parent is prevented from challenging the reasonableness of [reunification] services on appeal if the issue was not first brought to the attention of the juvenile court"]; *In re Christina L.* (1992) 3 Cal.App.4th 404, 416.) He therefore waived any error. In his reply brief, father asserts he preserved his objection, but the record does not support him. The objection his brief cites involved an exchange between his counsel and the court in which counsel tried to reopen a discussion about the court's "precluding me from calling witnesses to testify to [appellant's] behavior." Interrupting counsel, the court told him he was "beating a dead horse. . . . All you have to do is object." Counsel's complaint about restrictions on witnesses is not an objection to the court's reunification plan or order. Given a trial court's expertise in fashioning a reunification plan, it was incumbent on father to voice any objections so that they could be addressed immediately.

CROSS-APPEAL BY THE DEPARTMENT

The petition against father alleged he nonaccidentally inflicted "serious physical harm" on K., or was at risk of doing so. (§ 300, subd. (a).) The petition based its allegation on father's domestic violence against mother, and father's purported physical abuse of K. The department offered no evidence of serious physical harm to K. Instead, it pointed to father's treatment of K. at the hospital, which the department describes as

"manhandling." The police concluded, however, after investigating the hospital incident that K. was unhurt and "in no danger." After adjudicating the allegation, the court found by a preponderance of the evidence that the department did not meet its burden of proving K. had suffered, or was at risk of suffering, *serious* physical harm. The court therefore dismissed the allegation.

The department contends the court erred in not sustaining the allegation. The department's contention, which requires us to reweigh the evidence, asserts that the record reasonably supports only one conclusion: K. had suffered, or was at risk of suffering, serious physical harm. The department cites no authority, however, that "manhandling," which leaves no marks, bruises, or other injury is, as a matter of law, "serious physical harm." Furthermore, the department cites no authority that we may reweigh the evidence in order to reach the conclusion that the trial court rejected.

The department alternatively contends that even if no evidence existed of serious physical harm to K., section 300, subdivision (a), permitted the court to sustain the allegation based on (1) the manner in which father inflicted a nonserious injury on K., or (2) a history of repeated injuries, or (3) other indicia of risk in combination with the first two factors. In support of this alternative basis for finding jurisdiction, the department cites father's "global" rage as demonstrated by his loss of control in various settings, such as congested traffic. The department offers no authority, however, that a trial court *must* find a risk of serious physical harm based on father's temper tantrums that sometimes escalated to punching inanimate objects. Here, the trial court weighed all the evidence, sustained some of the petition, and rejected other parts. Substantial evidence supports its ruling. The department's alternative basis for challenging the court's dismissal of the allegation also fails.

DISPOSITION

The jurisdictional findings and dispositional order are affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.

FLIER, J., Concurring

I concur in the affirmance of the order from which father S.K. appeals and I also agree with the rejection of the department's appeal. I write separately, however, to express my concern over the damage to father's relationship with minor K. that the trial court's order limiting father to monitored visits will inflict. I am also concerned over the implication that disagreements and arguments between parents who are parting company justify seriously curtailing a parent's contact with his or her child.

While there is evidence that father on one or two occasions engaged in inappropriate physical conduct with mother, there really is very little to show that father ever posed a physical threat to minor K. In fact, there is substantial evidence that he did nothing of the sort but rather has a warm and supportive relationship with minor K. Limiting father to supervised visits with minor K. does not really speak effectively to the actual problem, which is father's relationship with, and his conduct toward, mother. I agree with the opinion because it is true that physical altercations between parents may well pose a threat to their very young children; this is the evidence that supports the trial court's order. On the other hand, curtailing father's relationship with minor K. is a serious interference with father's rights and prerogatives as a parent. One would hope that the trial court will vacate this order as soon as it is clear that father poses no threat to minor K.

The sad fact is that monitored visits play into the disintegrating relationship between father and mother at a time when mother has voiced her intention to keep father away from the two children forever. The children should not become pawns in the fight between the parents, nor should the trial court's order tip the scales in favor of one parent over the other. This is yet another reason why the trial court should revisit the decision about monitored visits in the near future. In the final analysis, the issue is the child's

safety. When that is assured, monitored visits should terminate and the parents should sort out the difficult question of custody without the impediment of an order limiting father's contact to monitored visits.

In my opinion, the trial court's order of monitored visits survives appellate scrutiny by the barest of margins. There is also the troubling decision not to allow the grandparents to testify. While the trial court's decision on this is technically correct, one would think that the more information the court has about father's relationship with minor K., the better. But even with the grandparents excluded, there is solid evidence that shows that father has a very good relationship with minor K.

In sum, there is every indication that the problem is between father and mother, and not between father and minor K. I trust that the trial court will be guided by this fact.

FLIER, J.